

Message Text

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ACTION EB-07

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FM AMEMBASSY BRUSSELS
TO SECSTATE WASHDC 0576
INFO ALL EC CAPITALS
USMISSION GENEVA
AMEMBASSY TOKYO

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USEEC

GENEVA ALSO FOR MTN

E.O.11652:N/A
TAGS: ETRD, EEC
SUBJECT: EC CONCERN OVER ZENITH AND US STEEL CASES'
IMPLICATIONS

REF: BRUSSELS 5843

1. COMMISSION INFORMS US THAT THE QUESTION OF THE
ZENITH CASE AND US STEEL CASE IMPLICATIONS AND EC TRADE
WAS NOT DISCUSSED AT THE JUNE 21 FOREIGN MINISTERS
COUNCIL, BUT THAT A PAPER, APPROVED BY THE COMMISSION,
WAS DELIVERED TO MEMBER STATES ON JUNE 22 AND WILL
PROBABLY FURNISH THE BASIS FOR A DISCUSSION AT A
SUBSEQUENT COUNCIL MEETING.

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2. THE PAPER POINTS OUT THAT THE US ADMINISTRATION HAS
CLEARLY OPPOSED THE FINDINGS OF THE COURT. NONETHELESS,
IT MENTIONS THAT THE USG MAY, AT SOME POINT, SEEK A
NEGOTIATED TRADE OFF, SHOULD IT BE OVERRULED IN THE
COURTS. THE PAPER RESTATES THE COMMUNITY'S POSITION
THAT THE VALUE-ADDED TAX IS NOT NEGOTIABLE. THE PAPER
ALSO SUGGESTS THAT THE EC NEEDS TO ENGAGE IN CONTINGENCY

PLANNING, INCLUDING RETALIATION SHOULD US COUNTERVAILING DUTIES BE APPLIED TO EC EXPORTS BENEFITING FROM VAT REBATES. THE PAPER DOES NOT SPELL OUT POSSIBLE AREAS OF RETALIATION, BUT SAYS THAT THE COMMISSION WILL SEEK TO LIMIT ACTION TO THE FIELD OF CUSTOMS ADMINISTRATION AND WILL WISH TO AVOID ESCALATION.

3. MISSION HAS OBTAINED TEXT OF COMMISSION PAPER, WHICH FOLLOWS. POSSESSION OF THIS DOCUMENT BY USG SHOULD NOT BE REVEALED.

BEGIN TEXT

POSSIBLE US COUNTERVAILING ACTION AGAINST REMISSION OF VAT ON E.C. EXPORTS (COMMUNICATION FROM THE COMMISSION TO THE COUNCIL)

1. THE COMMISSION DRAWS ATTENTION TO THIS ISSUE FOR ITS FAR-REACHING ECONOMIC AND POLITICAL IMPLICATIONS AND INVITES THE COUNCIL TO SHARE ITS ANALYSIS AND CONCLUSIONS AS SET OUT BELOW.

THE US COURT CASE

2. THE COMMISSION BELIEVES THAT A DANGEROUS BODY OF JURISPRUDENCE IS IN THE MAKING IN THE US IN REGARD TO THE LIMITED OFFICIAL USE

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REMISSION OF INDIRECT TAXES TO FOREIGN EXPORTERS. ON THE BASIS OF US COUNTERVAILING DUTY LEGISLATION DATING BACK TO 1897, A US CUSTOMS COURT HAS RECENTLY RULED AGAINST THE REBATE OF THE JAPANESE COMMODITY TAX ("ZENITH" CASE). THIS COURT SEEMS LIKELY TO BUILD ON THIS PRECEDENT WHEN IT COMES TO JUDGE A COMPLAINT LODGED BY US STEEL AGAINST THE REMISSION OF VAT TO EC STEEL EXPORTERS.

3. THE COMMISSION CONSIDERS THAT THE COMMUNITY MUST NOW FACE UP TO WHAT IT BELIEVES IS THE SERIOUS RISK THAT THESE CUSTOMS COURT DECISIONS WOULD NOT BE REVERSED AT A LATER STAGE, IN THE US CUSTOMS AND PATENT APPEALS COURT OR EVEN IN THE US SUPREME COURT.

4. THE JUDICIAL TIMETABLE FOR THE COMMUNITY CASE IS STILL FAR FROM CLEAR. BUT A DECISION AGAINST THE COMMUNITY COULD BE REACHED IN THE NEW YORK CUSTOMS COURT AT ALMOST ANY POINT BETWEEN THE END OF JUNE (IF "SUMMARY JUDGEMENT" ON THE PRECEDENT OF THE "ZENITH" DECISION IS GRANTED) AND THE AUTUMN OF 1977 (IF THE CASE AGAINST THE COMMUNITY IS PURSUED ON A NORMAL TIMETABLE). FROM THAT POINT, AND PENDING THE OUTCOME OF APPEALS IN THE HIGHER COURTS, US

CUSTOMS APPRAISEMENT ON EC STEEL EXPORTS WOULD BE WITH-
HELD. THEREAFTER, A DECISION IN THE APPEALS COURT MIGHT
BE EXPECTED AT THE END OF THIS YEAR OR EARLY IN 1978; AND
A FINAL DECISION IN THE SUPREME COURT LATER IN 1978.
THE TRADE AT STAKE

5. IN THE EVENT OF AN ADVERSE FINAL JUDGEMENT IN THE US
COURTS, THE US TREASURY WILL FIND ITSELF UNDER COURT
ORDER TO IMPOSE COUNTERVAILING DUTIES (EQUIVALENT TO THE
TAX REMITTED IN EACH INDIVIDUAL CASE) ON ROUGHLY A BILLION
DOLLARS WORTH OF EC STEEL TRADE. THE ISSUE SEEMS UNLIKELY
TO STOP THERE. INDIRECTLY, ALMOST ALL THE COMMUNITY'S
TRADE COULD BE AFFECTED BY REFERENCE TO THE SAME PRINCIPLE
OF LAW, IF OTHER PROTECTIONIST US LOBBIES WISHED TO JUMP
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ON THE BAND-WAGGON.

6. THE TRADE IMPACT WILL STILL BE SERIOUS ENOUGH TO
WARRANT CONCERN, EVEN IF THE IMMEDIATE DAMAGE DOES NOT GO

BEYOND A TEMPORARY WITHHOLDING OF CUSTOMS APPRAISEMENT.
AT A TIME WHEN IT IS OF THE FIRST IMPORTANCE TO RESTORE
BUSINESS CONFIDENCE, WHICH HAS SUFFERED DURING THE
ECONOMIC RECESSION, THE UNCERTAINTIES CREATED WILL
NEVERTHELESS FURTHER DISCOURAGE TRADE; AND EXPORTERS WILL
BE SUBJECT TO COSTLY BONDING REQUIREMENTS.

7. THE THREAT APPLIES NOT ONLY TO THE EC AND JAPAN BUT
ALSO TO THE TRADE WORLD AT LARGE. MOST US TRADE PARTNERS
REMIT INDIRECT TAXES ON EXPORTS.

THE GATT CASE

8. THE DEVELOPING US JURISPRUDENCE REFERRED TO ABOVE IS
IN VIOLATION OF GATT ARTICLE VI & 4 AND THE NOTE TO
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ARTICLE XVI. THIS HAS BEEN CONFIRMED IN THE WORKING
GROUP SET UP BY THE GATT COUNCIL TO CONSIDER JAPAN'S
COMPLAINT IN THE ZENITH CASE. BUT THE CUSTOMS COURT'S
FINDINGS INCLUDE THE FOLLOWING: "....GATT IS A TRADE
AGREEMENT, WHICH IF IN CONFLICT WITH THE LAW OF CONGRES...,
MUST YIELD TO THE LATTER."

9. UNDER THE TRADE ACT OF 1974, THE US ADMINISTRATION IS
INSTRUCTED TO TAKE ACTION AS MAY BE NECESSARY TO SECURE
THE REVISION OF GATT ARTICLES WITH RESPECT TO THE "TREAT-
MENT OF BORDER ADJUSTMENTS FOR INTERNAL TAXES TO REDRESS
THE DISADVANTAGE TO COUNTRIES RELYING PRIMARILY ON DIRECT
RATHER THAN INDIRECT TAXES FOR REVENUE NEEDS" (SECTION 121
& A (5)).

THE US GOVERNMENT ATTITUDE

10. THE TREASURY HAS REJECTED THE US STEEL COMPLAINT AS
A MATTER OF PRINCIPLE AND FROM THE OUTSET. INDEED, THE
US GOVERNMENT HAVE MADE IT CLEAR THAT THEY DISAPPROVE OF
SUCH COUNTERVAILING ACTION AGAINST THE REMISSION OF
INDIRECT TAXES. DURING PRESIDENT JENKINS' VISIT TO
WASHINGTON IN APRIL, PRESIDENT CARTER HIMSELF INDICATED
HIS DESIRE TO SEE THE CASE SETTLED SATISFACTORILY.

11. NEVERTHELESS, IF DEFEATED IN THE COURTS AND COMPELLED
TO LOOK FOR REMEDIES REQUIRING CONGRESSIONAL CONSENT, THE
ADMINISTRATION WILL, HOWEVER, CLEARLY BE UNDER PRESSURE
TO SEEK SOME FORM OF TRADE-OFF INVOLVING NEGOTIATIONS ON
FISCAL BORDER ADJUSTMENTS.

THE COMMUNITY ATTITUDE

12. IT IS THEREFORE IMPORTANT FOR THE COMMUNITY TO

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AVOID ANY AMBIGUITY AS TO THE NATURE OF THE PROBLEM. IT IS NOT FOR THE US ADMINISTRATION TO POINT TO THE COURTS OR TO THE CONGRESS. THE INCOMPATIBILITY OF US DOMESTIC LAW AND US INTERNATIONAL OBLIGATIONS IS FOR THE UNITED STATES AS SUCH TO RESOLVE. THE COMMUNITY DOES NOT HAVE TO PAY A PRICE TO SECURE US RESPECT FOR SUCH OBLIGATIONS.

13. IN PARTICULAR THERE CAN BE NO QUESTION WHATSOEVER OF MAKING THE COMMUNITY'S VALUE-ADDED TAX NEGOTIABLE.

14. IT THEREFORE FALLS TO THE AMERICAN ADMINISTRATION TO TAKE THE NECESSARY REMEDIAL ACTION. IF THIS REQUIRES FRESH US LEGISLATION, THE COMMUNITY WILL LOOK TO THE ADMINISTRATION TO START PREPARING THE GROUND ACCORDINGLY, AND IN THE INTERVAL TO MAKE USE OF EVERY AVAILABLE PROCEDURAL DEVICE TO DELAY AN ADVERSE COURT DECISION.

CONTINGENCY PLANNING

15. MEANWHILE THE COMMUNITY MUST BE READY FOR ALL CONTINGENCIES. THIS IS NOT TO OVER-DRAMATIZE THE SITUATION; THE COMMISSION INDEED REMAINS CONFIDENT IN THE US ADMINISTRATION'S DESIRE TO AVERT THE DANGER. BUT IT IS CLEAR THAT, IF US COUNTERVAILING DUTIES ARE APPLIED TO OUR EXPORTS, RETALIATORY MEASURES CANNOT BE AVOIDED, IN ORDER TO RESTORE THE BALANCE OF TRADE ADVANTAGES UNDER THE RULES OF THE GATT.

16. THE COMMISSION WILL THEREFORE BE READY TO PRESENT RAPIDLY TO THE COUNCIL WHATEVER DETAILED PROPOSALS THE DEVELOPING SITUATION MAY WARRANT. THE COMMISSION WILL SEEK AN ADEQUATE AND CREDIBLE RESPONSE IN KEEPING WITH THE NATURE OF THE CHALLENGE, WHICH IS STILL LIMITED TO THE FIELD OF CUSTOMS ADMINISTRATION; AND WILL WISH TO AVOID AN ESCALATION OF RETALIATORY MEASURES.

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17. WHATEVER EFFORTS THE COMMUNITY AND THE US MAY MAKE TO KEEP THIS CONFLICT WITHIN REASONABLE BOUNDS, IT IS CLEAR THAT THE IMPLEMENTATION BY THE US OF TRADE RESTRICTIONS OF SUCH A FUNDAMENTAL CHARACTER, AGAINST CLEARLY ESTABLISHED INTERNATIONAL RULES COULD NOT REMAIN WITHOUT INCIDENCE ON THE PURSUIT OF THE MULTI-LATERAL TRADE NEGOTIATIONS.

IMMEDIATE ACTION

18. THE COMMUNITY WILL CLOSELY CO-ORDINATE ITS OWN EFFORTS WITH INTERESTED THIRD COUNTRIES AND IN PARTICULAR WITH JAPAN. THE COMMISSION HAS ESTABLISHED THE APPROPRIATE LINKS TO THIS EFFECT.

19. IN DIRECT CONTACTS WITH US DECISION-MAKERS, A CONSTANT EFFORT WILL BE MADE TO EXPLAIN THE DANGER AND TO STIMULATE PREVENTIVE ACTION. AN EDUCATIONAL CAMPAIGN WILL THEREFORE BE LAUNCHED WITH THE HELP OF THE COMMUNITY'
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INFORMATION SERVICES WITH A PARTICULAR VIEW TO MOBILIZING US TRADE LOBBIES (AGRICULTURAL AS WELL AS INDUSTRIAL) LIKELY TO BE INTERESTED IN THE AVOIDANCE OF A MAJOR TRADE CONFLICT.

PROPOSAL TO THE COUNCIL

20. THE COMMISSION INVITES THE COUNCIL TO ENDORSE THE FOREGOING ANALYSIS AND CONCLUSIONS. IT WILL SUBMIT FURTHER COMMUNICATIONS ON THIS SUBJECT AS APPROPRIATE.
END TEXT. MORRIS

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Message Attributes

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